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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980
NO. ____

Sunnyside Valley Irrigation District,

Petitioner,

v.

Kittitas Reclamation District; United States of America; Roza Irrigation District; Union Gap Irrigation District; and Yakima Valley Canal Company;

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES C. FLOWER and
PATRICK M. ANDREOTTI of
FLOWER & ANDREOTTI, P.S.
Counsel for Petitioner.

Office and Post Office Address:
Suite 2, Yakima Legal Center
303 East "D" Street
Yakima, Washington 98901.
(509) 248-9084.

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QUESTIONS PRESENTED

(1) Whether the "dead storage" water in Lake Cle Elum which was appropriated at the time of the entry of the January 31, 1945, Consent Judgment, is within the terms of the Judgment.

(2) Whether the "dead storage" water in Lake Cle Elum is "project water".

(3) Does the granting of the right to pump "dead storage" water for the benefit of parties with only proratable rights under the January 31, 1945, Judgment, constitute an unconstitutional impairment and taking without compensation of the vested rights of those parties with non-proratable rights to the delivery of water.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
CONSTITUTIONAL PROVISIONS INVOLVED .	2
STATEMENT OF THE CASE	3
History of the Yakima Project . . .	4
Rulings Below	15
REASONS FOR GRANTING THE WRIT	16
A. "Dead Storage" is Within the Terms of the 1945 Judgment . . .	17
B. 1945 Judgment Creates Only Two (2) Types of Irrigation Water Rights in the Yakima Project	23
C. Lower Court Decisions Contrary to D.C. Circuit Court Decision	24
D. "Project Water" Not Applicable in the Yakima Project . .	24
E. Beneficial Use, Unconstitutional Taking of Property . .	27
CONCLUSION	28
INDEX TO APPENDIX	30

TABLE OF AUTHORITIES

TABLE OF CASES

Page

Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (D. Col. 1910) 22

Eastside Canal & Irrigation Co. v. United States, 70 F.Supp. 836 (Ct.Cl. 1948) 22

Fox v. Ickes, 137 F.2d 30 (D.C. Cir. 1943), Cert. Denied, 320 U.S. 792, 88 L.Ed. 477, 64 S.Ct. 204 (1943) 8, 24

Ickes v. Fox, 300 U.S. 82, 81 L.Ed. 525, 57 S.Ct. 412 (1937) 8, 25, 27

Israel v. Morton, 549 F.2d 133, (Ninth Cir. 1977) 15, 25, 27

Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155 (1907) 28

State Department of Parks v. Idaho Department of Water Administration, 96 Id. 440, 530 P.2d 294 (1974) 22

United States v. Armour Baking Co., 402 U.S. 673, 29 L.Ed.2d 256, 91 S.Ct. 1752 (1971) 17

United States v. Atlantic Richfield Co., 360 U.S. 19, 3 L.Ed.2d 1054, 79 S.Ct. 944 (1959) 24

United States v. ITT Continental Baking Co., 420 U.S. 223, 43 L.Ed. 2d 148, 95 S.Ct. 926 (1975) . . . 17, 18

CONSTITUTIONAL PROVISIONS

	Page
United States Constitution, Amendment V, ...	2, 28
Washington State Constitution, Amendment 9, Article I, Section 16	2, 28

MISCELLANEOUS

Water Rights in the Western States, Wiehl (3d Ed. 1911)	22
Water & Water Rights, (Clark Ed. 1976)	22
In the Matter of Donald E. Bevan v. Washington State Department of Ecology, Washington Pollution Control Hearings Board No. 48 (June, 1972)	22

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PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Sunnyside Valley Irrigation District, the Petitioner herein, prays a Writ of Certiorari issue to review the July 28, 1980, Judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed, is reported at 625 F.2d 95, and is printed in Appendix "A" hereto, pages A-1 to A-12. The prior, unreported opinion of the District Court for the Eastern District of Washington is printed in the Appendix at pages A-14 to A-18.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on July 28, 1980. A timely Petition for Rehearing was denied on September 10, 1980. (Appendix "A", page A-13). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional provisions involved are as follows and are reproduced in Appendix "A", infra, pages A-19 to A-21.

Constitutional Provision of the
United States, Amendment V,
Due Process . . . . . Appendix Page A-19

Constitutional Provision of the
State of Washington, Amendment 9,
Article I, Section 16, Eminent
Domain . . . . . Appendix Page A-20
to A-21.

STATEMENT OF THE CASE

This is an action brought by the Roza Irrigation District seeking an interpretation and construction of the January 31, 1945, Consent Judgment, which would exclude from the terms of the Judgment "dead storage" water in Lake Cle Elum and permit this water to be pumped and delivered by the United States Bureau of Reclamation without regard to the allocations and rights established by the January 31, 1945, Consent Decree.

History of the Yakima Project

Appropriation of water in the Yakima River watershed for irrigation purposes began in the 1850's and continued until 1902 primarily from the natural flow of the Yakima River and its tributaries. By 1902, only two small storage reservoirs were developed in the Yakima Basin, including the Union Gap Irrigation District (herein "Union Gap") dam on Lake Cle Elum to contain the natural lake and stream water flowing into it.

The basis of this action is the determination of the proper treatment and classification of the so-called "sub" or "dead" storage water consisting of Lake Cle Elum as it naturally existed prior to the raising of the lake level by the Union Gap Dam and later reclamation projects undertaken by the United States. "Dead storage" is defined as "the volume of a reservoir below the level of the lowest outlet; the amount that cannot be drained by gravity flow through the outlets". 7 Waters and Water Rights 276 (Clark Ed. 1976). (Record On Appeal, herein "RA", 513).

By 1902 with approximately 120,000 acres being irrigated in the Yakima water-

shed, natural flow of the river and its tributaries was inadequate to supply all the irrigation appropriators during the months of July, August and September or to develop additional acreage in the Yakima Basin. Petitioner-Sunnyside Valley Irrigation District (herein "SVID") and its predecessor in interest, Washington Irrigation Company, appropriated in 1890 and 1891 for its users 1,000 cfs from the natural flow of the Yakima River. By 1902, approximately 44,000 acres were being irrigated by Washington Irrigation Company's diversion, canal and laterals.

"With the passage of the 1902 Federal Reclamation Act, the United States Reclamation Service (now "United States Bureau of Reclamation") began studies to expand the irrigable area within the Sunnyside Division and the Yakima-Tieton Division by construction of storage facilities. However, since storage reservoirs would necessarily have to be operated subject to these existing users of the river, the Secretary of Interior required as a condition to federal construction that these existing users voluntarily define and limit their claims to natural flow. Thus, as an

alternative to a lengthy and costly adjudication of the existing rights on the river, approximately fifty users [including SVID] on or about 1905 executed limiting agreements on a form prescribed by the United States. Approximately 5% of the existing users did not sign such limiting agreements . . . "

"Following the execution of these limiting agreements and the consequent settlement of existing water rights to his satisfaction, the Secretary of Interior in 1906 announced construction [on the Yakima Project] could begin. In that year, the United States acquired the irrigation and diversion facilities of the Washington Irrigation Company serving lands in what is now the Sunnyside Division subject to the rights of the water users by contracts for irrigation delivery from the Washington Irrigation Company. The United States enlarged and extended the system and entered into contracts with the new land served by the enlarged system within the Sunnyside Division. The United States also in 1907 began construction of the Yakima-Tieton Division." (RA 282-83).

Water users in the Yakima Project periodically experienced irrigation water

shortages in 1905, 1909, 1915, 1926, 1930, 1931, 1940, and 1973. (RA 79, 95, 321).

In 1930, the Bureau of Reclamation proposed construction of the present Lake Cle Elum Reservoir and filed Application No. 3210 with the State of Washington for a permit "to construct a reservoir and to store for beneficial use the unappropriated waters of the State of Washington" and in June, 1931, permit number 97 was issued for the construction of the reservoir. The application for the permit gave the amount of water to be stored and appropriated as 535,000 acre feet which includes 436,900 acre feet of gravity flow storage and approximately 100,000 acre feet of dead storage. At the time of the entry of the 1945 Consent Decree, permit number 97 was in effect and granted the United States as trustee for all water users in the Yakima Project storage rights to both the gravity flow storage and dead storage in Lake Cle Elum.

At the time construction was started on the Lake Cle Elum Reservoir, the Bureau of Reclamation attempted to change, without the parties' agreement, the per acre charge and amount of water delivered to many SVID water users. Some water users in

the Sunnyside Division started the litigation reported in Ickes v. Fox, 85 F.2d 294, (D.C. Cir. 1936); 300 U.S. 82 (1937) and Fox v. Ickes, 137 F.2d 30 (D.C. Cir. 1943).

In 1933, the Bureau of Reclamation acting in behalf of all the Yakima Project users completed construction of the present Cle Elum Dam impounding within the reservoir the approximately 535,000 acre feet of water for which it had previously received a permit to appopriate and apply to beneficial use.

This case (Eastern District of Washington, Civil No. 21) was started by the United States for a judicial determination of the United States' obligation to deliver irrigation water without additional charge to SVID land. (RA 1-63, 134) The Complaint also requested and was expanded by the Defendants' pleadings to include an adjudication of the extent and nature of all irrigation users' rights from Yakima Basin diversion. (RA 64-132, 134).

In 1943, the District of Columbia Circuit Court of Appeals decision of Fox v. Ickes, 137 F.2d 30, rendered moot the issue of the U.S. obligation to deliver water without additional charge to SVID users. The parties proceeded with a general

adjudication among themselves of their respective rights in all the water of the Yakima River and its tributaries. (RA 134)

On January 31, 1945, all parties in this suit, including Appellant-SVID and Respondents-Roza Irrigation District (herein "Roza") and the United States settled as among themselves, their respective irrigation and water rights in the Yakima Basin. The parties' settlement was embodied in a "Judgment" (RA 144-73) clarified by the written "Statement to the Court" (RA 134-142) and oral colloquy of counsel with the Court. (RA 323-53).

The January 31, 1945, "Judgment" in pertinent part provides:

> "2. The obligations of the United States to deliver from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants and to the lands within the Wapato Indian Irrigation Project, are as set forth hereafter in this judgment. (Emphasis added.)
>
> "3. Sunnyside Division. - The United States shall divert each year into the Sunnyside main canal, hereafter referred to as the Sunnyside Canal, to supply the water rights of the parties

entitled to receive water from the Sunnyside Canal in the Sunnyside Division, a total quantity of 449,520 acre feet of water on the following monthly schedule:" . . . (RA 145)

[Paragraphs 3-16 define the quantities of water entitlement of each party subject to the non-proratable quantities provided by paragraph 19] . . .

"18. The parties to this judgment except as provided in paragraph 19 hereof shall have equal rights with respect to the priority in the delivery of its quantities of water to which they are entitled under the preceding paragraph of this judgment. . . . (RA 169)

"For the purposes of this Judgment 'total water supply available' is defined as that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources to supply the contract obligation of the United States to deliver water and supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States. (Emphasis added).

"19. The following amounts of water are excepted from the preceding paragraph [18] with respect to proration and the summation of said amounts shall be deducted from the 'total water supply available subject to proration (Emphasis added) . . . (RA 170). [The remainder of paragraph 19 describes the non-proratable quantities of water vested in SVID, Yakima-Tieton, Wapato, Prosser, Konnewok, Piety Flat, and others not including Roza or Kittitas Reclamation District (herein 'KRD')].

* * *

"20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment and the lands within the Wapato Indian Irrigation Project. Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to, or interfering with any of the rights to the use or the delivery of those quantities of water which are recognized in this judgment. . . . " (RA 172)

* * *

No parties, including Roza or the United States which had drawn and administered the January 31, 1945, Judgment, challenged it from 1945 to the winter of 1977 when the Bureau of Reclamation miscalculated the prospective total 1977 water supply and it appeared the Yakima Project would suffer a severe water shortage. Respondents-Roza and KRD petitioned the Court to reopen, interpret and modify the January 31, 1945, Judgment, and prevent the Bureau of Reclamation from distributing the water in accord with the non-proratable provisions of the Judgment. (RA 174, 176-206).

Respondent-United States moved to appoint a watermaster (RA 208), to approve pumping from the Lake Cle Elum Reservoir (RA 265) and to permit an interchange of water (RA 273). Appellant-SVID and others moved to deny the various motions (RA 277).

On April 22, 1977, District Court Judge Marshall A. Neill denied the Motions to reopen, for interpretation and administration (RA 446-447) and to approve pumping from Lake Cle Elum (RA 448) and interchange of water (RA 449). Judge Neill did, however, grant the Motion to appoint a watermaster subject to appropriate

instructions. (RA 451-52)

On March 1, 1978, Respondent-Roza filed a "Notice and Motion" requesting the Court's interpretation of the 1945 Judgment to determine the status of so-called "sub" or "dead" storage water in the Cle Elum Reservoir. (RA 461) Roza's Motion was supported by the United States (RA 464-67), partially supported by Washington State (RA 500) but resisted by SVID (RA 471, 491), Yakima-Tieton Irrigation District (herein "Yakima-Tieton") (RA 492-94), Union Gap and others.

Judge Neill on July 13, 1978, filed his "Memorandum and Order" in response to the several Motions (RA 513-16). SVID on August 3, 1978, filed a timely "Notice of Appeal". (RA 517).

The Bureau of Reclamation (herein "Bureau") on August 19, 1977, applied to Washington State for a permit to appropriate and store the Lake Cle Elum "dead storage" for the exclusive use of Roza to augment in a shortage year, Roza's junior, proratable, Warren Act allocation provided by the January 31, 1945, "Judgment". (RA 473-74, 487-91). The Bureau's application has been protested by SVID and Yakima-Tieton (TR, Vol. II, p. 29-30, 34), is pending and has not been granted.

The Bureau intends to use the floating electric pumps it installed on Lake Cle Elum in 1977 to lift the natural lake (dead storage) water into the intake tunnel of the present dam. (RA 488-89). On October 6, 1979, a fire, apparently the result of spontaneous combustion, on the pumping station barge damaged between 4 and 6 of the motors, 4 of the pumps, and completely destroyed one transformer. Although the watermaster of the Yakima Project had estimated the pumps could be repaired in 3 months on an emergency basis or 6-8 months on a regular time basis, the pumps have, since October 6, 1979, been completely inoperable.

Assuming a pumping station in operable condition, the pumping of sub storage could presumably not begin until the approximate 436,900 acre feet of gravity flow storage water which is indisputably subject to the 1945 Judgment has been drawn down to the intake tunnel of the dam; otherwise, there would be an obvious loss of essential foundation support under Appellants and other non-proratable users upper, gravity flow water (RA 505-07; TR, Vol. II, p. 24-26).

The Rulings Below

District Court ruled on July 13, 1978, in an unreported "Memorandum and Order", that at the time of the entry of the 1945 Judgment the only available water from Lake Cle Elum was that supplied by gravity, that it was not until the Bureau of Reclamation artificially created a means to gain beneficial use of the "dead storage" water through pumping that the water became available for beneficial use and that the "withdrawal of 'dead storage' waters from Lake Cle Elum was not within the contemplation of the parties when the 1945 Decree was entered." The Court ruled that under the holding of Israel v. Morton, 549 F.2d 133 (Ninth Cir. 1977), the "dead storage" waters are"project waters"and the terms upon which it can be put to use, and the manners in which rights to continued use can be required are for the United States to fix.

The Court recognized that the withdrawal of "dead storage" water would affect water allocated under the 1945 Decree because the gravity flow and "dead storage" water cannot be separated, and held that "dead storage" water could be withdrawn only after full provision was

made for the monthly allocation under the 1945 Decree. The duty of regulating the withdrawal of "dead storage" water and protecting the non-proratable users under the 1945 Decree was placed upon the watermaster appointed by the Court in 1977.

The Court of Appeals found that the 1945 Consent Decree was ambiguous with respect to the inclusion or exclusion of dead storage water in Lake Cle Elum and that the Decree was, therefore, subject to construction by the District Court. The Court of Appeals found the District Court's interpretation of the Consent Decree to be reasonable, upheld its determination that "dead storage" water was not within the terms of the Decree, that it was project water and that the power to regulate the withdrawal of dead storage water given the watermaster was not too broad.

REASONS FOR GRANTING THE WRIT

The questions presented for review in this case raise several issues of general importance which should be decided by the Supreme Court because they affect the development and farming of arid land in areas where water is stored in government constructed facilities and in particular the Yakima River Basin of the State

of Washington. The central issue in the case is whether the 1945 Consent Judgment agreed upon by numerous parties including all the parties in this appeal, to avoid expense, delays and uncertainties involved in the general adjudication of water rights in the Yakima River Basin should be construed and interpreted consistent with the purpose and intent of the Judgment or whether the Decree should be construed and interpreted in a manner which destroys the fundamental purpose of the Consent Judgment and is in conflict with another Circuit Court decision.

A. "Dead Storage" is Within Terms of 1945 Judgment:

The scope of a Consent Judgment must be determined from within the four corners of the Judgment, United States v. Armour & Co., 402 U.S. 673, 682, 29 L.Ed.2d 256, 91 S.Ct. 1752 (1971), but a Court may consider surrounding circumstances as aids in construing a Consent Decree. United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 43 L.Ed.2d 148, 95 S.Ct. 926 (1975).

The Court of Appeals found the 1945 Judgment to be ambiguous because the definition of total water supply available contained in paragraph 18 of the Judgment

did not explicitly deal with "dead storage" water but could be interpreted to include or exclude "dead storage" water. The District Court in construing the Decree held that "dead storage" was not available for irrigation at the time of the entry of the 1945 Judgment, the withdrawal of dead storage water was not within the contemplation of the parties to the Decree and, therefore, the withdrawal of dead storage water was not within the scope of the Decree. The Court of Appeals in affirming the District Court specifically stated that no beneficial use had been made of the "dead storage" water before, during or after the filing of the Consent Decree until the United States installed pumps on the Lake Cle Elum Reservoir in 1977.

Both the District Court and the Court of Appeals failed to give appropriate weight to the circumstances surrounding the entry of the Decree in determining whether the "dead storage" was within the scope of the Decree and both Courts failed to recognize that actual application of water on the land is not the exclusive test of "beneficial use".

United States v. ITT Continental

Baking Co., supra, at p. 238, recognizes a reviewing Court may consider supporting documents in determining the meaning and scope of a Consent Judgment. At the time of the entry of the 1945 Judgment, there was filed and read to the Court a "Statement to the Court" (RA 131-142) explaining the history of the litigation and also the purpose of the agreed Judgment as follows:

> "The Consent Judgment provides a basis of apportionment of the available supply of water which had been agreed to by the principal diverters from the stream. By the entry of the Consent Judgment there will be established a basis upon which the Bureau of Reclamation or a watermaster if one is appointed may divert to the users quantities of water agreed upon by them without danger of encroaching upon the legally constituted rights of other users within the project. Briefly the Consent Judgment as drafted fixes the rights of the parties as among themselves as follows:
>
> "(e) The Judgment recognizes the rights of the Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs (a), (b), (c), and (d). In a period of shortage,

> these users must ultimately accept a proportionate reduction based on a formula set out in the Judgment. The rights of the Sunnyside Valley Irrigation District and the Tieton Division, except as to quantities exempt from proration, will likewise be subject to reduction based on the same formula.
>
> "The parties to the suit are, by the Judgment, enjoined from asserting claims against each other or their successors and assigns insofar as the water rights covered by the Judgment are concerned. . . . "
> (Ephasis added) (RA 140-42)

It is clear from the definition of the "total water supply available" in the Judgment as " . . . that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries . . . " and the "Statement to the Court" that the purpose of the Judgment was to completely resolve, as between the parties to the Decree, all disputes over

the priority of water rights in the Yakima River Basin. The definition of "total water supply available" covers all conceivable sources of water which might be available in any year for delivery to the parties. The Statement to the Court makes it clear that those parties with nonproratable rights including SVID are entitled to the delivery of their nonproratable amount in any year in which that water is available from any source within the Basin, including "dead storage", should that water be available, because "dead storage" was storage in a government reservoir when the Decree was entered.

At the time of the entry of the Judgment, the United States had in effect a valid permit for the appropriation of all the water of the Lake Cle Elum Reservoir, including the "dead storage" which is at issue here. The dead storage water appropriated by the United States in 1930 under the State of Washington's water code had, contrary to the holdings of the District Court and Court of Appeals, been beneficially used since the time Union Gap constructed its first dam on the Cle Elum River prior to 1902 and was being beneficially used at the time of the entry of the

Decree as support for and a base from which other water impounded behind the Lake Cle Elum Dam was made available for irrigation use through gravity flow.

It is clear water need not be applied on the land for actual irrigation to be appropriated to an irrigation or other beneficial use. See, Eastside Canal & Irrigation Co. v. United States, 70 F.Supp. 836 (Ct.Cl. 1948); 2 Waters and Water Rights, 321 (Clark Ed. 1976); 1 Wiel, Water Rights in the Western States, Section 346 (3d Ed. 1911). See, also: Fish Propagation - In the Matter of Donald E. Bevan v. Washington State Department of Ecology, Washington Pollution Control Hearings Board No. 48 (June, 1972). (Printed as Appendix "A", pages A-22 to A-28); Recreation: Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (D.Col. 1910); State Department of Parks v. Idaho Department of Water Administration, 96 Id 440, 530 P.2d 924 (1974).

The 1/31/45 Judgment together with the "Statement to the Court" (RA 134 - 142) clearly requires that the "total water supply available in any year from natural flow, various government storages and other sources . . . " must be first used to fully

supply the non-proratable rights of Petitioner-SVID, Yakima-Tieton Irrigation District and the Wapato Project.

B. 1945 Judgment Creates Only Two (2) Types of Irrigation Water Rights in the Yakima Project:

Prior to entry of the 1/31/45 Judgment there existed in the Yakima Project at least four different categories of natural flow and storage water rights: direct flow rights, public notice rights, supplemental rights, and Warren Act (contractual storage) rights. (RA 137-40) The 1/31/45 Judgment eliminated the different types of rights as well as their historic priorities and created as between the parties only two (2) categories of water rights in the Yakima Project: "non-proratable" and "proratable".

Contrary to the clear intent of the parties and express terms of the 1945 Judgment, the District Court and Ninth Circuit decisions in this case create a third class or "dead storage" right available to any water user in the Project who is willing to pay the United States for the cost of installing pump facilities. More appropriate language could and would have been used by the parties in 1945 if they had at that time intended the future creation of additional categories of

water - delivery rights. Cf. United States v. Atlantic Richfield Co., 360 U.S. 19, 22, 3 L.Ed.2d 1054, 79 S.Ct. 944 (1959).

C. Lower Court Decisions Contrary to D.C. Circuit Court Decision:

The District Court and Ninth Circuit decisions in this case are also in direct conflict with the D.C. Circuit Court's 1939 decision in Fox v. Ickes, supra, which held that an additional construction charge could not be imposed by the United States as a condition for delivering Lake Cle Elum storage water in which SVID landowners had acquired an appurtenant, vested property-irrigation water right. Contrary to Fox v. Ickes, supra, Petitioner-SVID and others with fully vested, non-proratable irrigation water rights must now necessarily either pay a substantial additional construction charge for the Cle Elum "dead storage" or upon their refusal to pay additional charges for the installation of the Cle Elum pump station, be denied their already vested, appurtenant non-proratable rights in the Cle Elum water and storage reservoir facility.

D. "Project Water" Not Applicable in the Yakima Project:

The inability of the United States to acquire rights in the Yakima Project

natural flow and irrigation storage water was clearly described and disposed of by the United States Supreme Court in Ickes v. Fox, 300 U.S. 82, 94, 81 L.Ed. 525, 57 S.Ct. 412 (1937):

* * *

> "Although the government diverted, stored and distributed the water, the contention of petitioner [Secretary of the Interior] that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowner; by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, fully distinct from the property right of the government in the irrigation works." (Emphasis added)

* * *

District Court and Ninth Circuit application of the "project water" concept expressed in Israel v. Morton, 549 F.2d 128 (9th Cir. 1977) is in direct conflict with Ickes v. Fox, supra, and is neither applicable nor controlling in this case.

The Israel facts are entirely different. Israel involved the right to deliver and use water in the Columbia Basin Irrigation Project in Central

Washington State. No water user within the Columbia Basin Project had appropriated any Columbia River water prior to the time the water was transported by the United States over substantial distances in government constructed canals from the major irrigation diversion at Grand Coulee Dam to farmland within the Basin project. As recognized in all the Fox v. Ickes cases, water users in Petitioner-SVID's district and others had constructed private diversions and canals and had appropriated all the natural flow of the Yakima River and its tributaries in the Yakima Basin prior to the beginning of the Yakima Reclamation Project by the United States. The United States in the Yakima Project is merely a "stake holder" for SVID and other vested water users required to deliver water according to the priorities agreed upon between the users.

Petitioner-SVID and other water users in the Yakima Project also have vested property rights in government reservoir storage including the Lake Cle Elum "dead storage", having "made all stipulated payments and complied with all obligations by which they were bound to the government, and, long prior to [1930] had acquired a

vested right to perpetual use of the waters as appurtenant to their land." Ickes v. Fox, 300 U.S. at 94. Even if the "dead storage" is considered "project water", SVID land has acquired appurtenant, vested rights to the water which the United States cannot take without just compensation.

In addition, Israel does not apply in this case because the "dead storage" was in fact actually appropriated pursuant to a valid Washington State permit and beneficially used as support-foundation without which the remaining water in Cle Elum Reservoir could not possibly be delivered by gravity flow to SVID and others at the time the 1945 Judgment was entered. Contrary to Israel, the "dead storage" is not water which would not exist but for development by the United States but is water which the government holds as trustee for the benefit of Petitioner and other water users.

E. Beneficial Use, Unconstitutional Taking of Property:

Withdrawal of Cle Elum "dead storage" removes the underlying support for the gravity flow storage in the reservoir, reducing the water available to fulfill

non-proratable delivery requirements. Withdrawal of "dead storage" in a short water year, followed by a second short water year in which the natural flow is insufficient to restore the "non-proratable water" provided by the 1945 Judgment would absolutely deny Petitioner-SVID its non-proratable water rights. Non-proratable water deliveries would be entirely dependent upon the continuous, proper functioning of the pumps installed at Cle Elum by the United States. Pumping out the "dead storage" or non-operation of the pumps will result in a taking of Petitioner-SVID's vested property rights without due process or just compensation in violation of the United States Constitution, Fifth Amendment, and Washington State Constitution, Article I, Section 16, as amended. Cf, Nielson v. Sponer, 46 Wash. 14, 89 Pac. 155 (1907).

CONCLUSION

WHEREFORE, Petitioner respectfully prays a Writ of Certiorari be granted and this Court review the Ninth Circuit Court of Appeals' July 28, 1980. Judgment.

Respectfully submitted,

Charles C. Flower

CHARLES C. FLOWER

Patrick Andreotti

PATRICK M. ANDREOTTI

FLOWER & ANDREOTTI, P.S.,
Attorneys for Petitioner.

INDEX TO APPENDIX

Page

Kittitas Reclamation District; United States of America, et al; v. Sunnyside Valley Irrigation District, et al, (Ninth Cir. July 28, 1980) 1

Kittitas Reclamation District, United States of America, et al, v. Sunnyside Valley Irrigation District, et al, Unreported Memorandum and Order (E.D. Wash., July 12, 1978) 14

United States Constitution, Amendment V, ... 19

Washington State Constitution Amendment 9, Article I, Section 16 . . 20

In the Matter of Donald E. Bevan v. State of Washington, Department of Ecology, Pollution Control Hearing Board No. 48 22

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT;
UNITED STATES OF AMERICA, et al,

Appellees,

v.

SUNNYSIDE VALLEY IRRIGATION
DISTRICT, et al.,

Appellants.

NO. 78-3065

United States Court of Appeals,
Ninth Circuit.

July 28, 1980.

Before DUNIWAY and ANDERSON, Circuit Judges, and BONSAL, District Judge*.

J. BLAINE ANDERSON, Circuit Judge:

In this action, as part of its continuing jurisdiction over a consent decree entered in 1945, the district court entered a Memorandum and Order interpreting and administering the consent decree. Sunnyside Valley Irrigation District (Sunnyside) appeals that Memorandum and Order.

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*The Honorable Dudley B. Bonsal, Senior United States District Judge, Southern District of New York, sitting by designation.

I. FACTS

This case had its genesis in a declaratory action in 1939. The action had been instituted to determine the obligation of the United States Bureau of Reclamation to deliver water to the Sunnyside Valley Irrigation District, which was situated in the Yakima Reclamation Project. A cross-complaint was also filed in the case requesting the court to determine the respective water rights of users of the waters of the Yakima River and its tributaries.

During the pendency of this action, the decision in Fox v. Ickes, 137 F.2d 30 (D.C.Cir.), cert. denied, 320 U.S. 792, 88 L.Ed. 477, 64 S.Ct. 204 (1943) was rendered. That decision, which dealt with the same Yakima Reclamation Project, essentially decided the issue of the obligation of the Bureau of Reclamation to deliver water within the Project. It was determined that the water rights of the irrigation districts and other water users were property rights acquired by their beneficial use of the water and were not merely contractual rights with the Bureau of Reclamation. While the Bureau of Reclamation was not obligated to furnish

any more water than was available, the court determined that the Bureau was obligated to distribute the available water according to the priorities of the parties that had been established according to the law of the State of Washington. Id. 137 F.2d at 33.

After the decision in Fox v. Ickes, only the issue of the actual priorities of the individual water users was left undecided. However, the parties in this case elected not to continue the adjudication over that issue. Instead, they agreed upon the 1945 consent decree.

The consent decree established an allocation schedule which defined the obligation of the Bureau of Reclamation "to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the Wapato Indian Irrigation Project." (Record at 145). As a result of the consent decree, the parties, such as appellant Sunnyside, were accorded certain non-proratable allocations of water, and others, such as appellee Roza Irrigation District (Roza), were accorded proratable allocations

of water in exchange for their claimed water rights.

No major problems arose in regard to the consent decree until 1977 when a severe drought affected the area. Faced with the prospect of a record drought, parties to the decree invoked the district court's continuing jurisdiction over matters of interpretation and administration of the consent decree (Record at 173). Among the several motions filed with the district court was a motion by the United States for authorization of a plan for pumping dead storage water from the Lake Cle Elum Reservoir (a reservoir within the Yakima Reclamation Project). The motion was denied as the district court ruled that the pumping of dead storage water from the reservoir was outside the provisions of the consent decree; thus, it could neither authorize nor prevent the pumping. (Record at 448).

The Bureau proceeded to install the pumps in the reservoir and an emergency permit to pump the dead storage water was granted by the State of Washington. The irrigation problems that were anticipated did not develop, however, and no water was actually pumped in that year.

On March 13, 1978, Roza filed a motion in district court seeking an interpretation of the consent decree. The motion sought an interpretation that the "dead storage water from the Lake Cle Elum Reservoir was not available from storage at the time of the entry of the 1945 [consent decree] and therefore [was] not part of the total water supply available as the same is defined and covered in . . . said judgment." (Record at 461) In a memorandum responding to that motion, the United States supported the interpretation sought by Roza. The United States also stated that another issue raised by the motion was whether rights in the "live storage" water could be protected if the dead storage water were withdrawn.

In its Memorandum and Order, the district court ruled that the dead storage water in the Lake Cle Elum Reservoir was not water that was subject to the 1945 consent decree; the dead storage water was "project water," and that the dead storage water could be withdrawn through pumping for the use of the parties financing the pumping project, but only after permission had been granted by the State of Washington to withdraw the water, and full pro-

vision had been made for the monthly allocations under the 1945 consent decree.

Sunnyside appeals that Memorandum and Order, contending that the dead storage water was part of the total water supply subject to the consent decree; and the dead storage water was not project water.

II. DISCUSSION

A. Dead Storage

The primary issue on appeal is whether the dead storage water in the Lake Cle Elum Reservoir is covered by the 1945 consent decree. Dead storage capacity is defined as that volume of a reservoir below the level of the lowest outlet. "Dead storage" water then is water that cannot be drained by gravity flow through outlets. 7 Waters and Water Rights 276 (Clark ed. 1976).

Under the consent decree, the "total water supply available" is defined as "that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in various Government reservoirs on the Yakima watershed and from other sources to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water

on the Yakima River, and its tributaries, heretofore recognized by the United States." (Record at p. 170) This definition of "total water supply available" does not explicitly deal with the dead storage water. However, since the definition could be fairly construed to either include or exclude dead storage water, it was subject to construction by the district court. See, U.S. v. ITT Continental Baking Co., 420 U.S. 223, 233-238, 43 L.Ed2d 148, 95 S.Ct. 926 (1975).

In construing a consent decree, its scope must be discerned within its four corners. U.S. v. Armour & Co., 402 U.S. 673, 682, 29 L.Ed.2d 256, 91 S.Ct. 1752 (1971). However, a consent decree is in many ways like a contract and a court may consider surrounding circumstances as aids in construing the consent decree. U.S. v. ITT Continental Baking Co., 420 U.S. at 238.

In interpreting contracts, factual findings of relevant surrounding circumstances are reviewed under the clearly erroneous standard. However, interpretation of the contract is a matter of law and is reviewable as such. Libby, McNeil and Libby v. City National

Bank, 592 F.2d 504, 512 (9th Cir. 1978); see Republic Pictures Corp. v. Rogers, 213 F.2d 662, 664-665 (9th Cir.), cert. denied, 348 U.S. 858, 99 L.Ed.2d 676, 75 S.Ct. 83 (1954). The same standard of review will be applied here to the district court's construction of the consent decree.

Before, during and after the filing of the consent decree, the only waters that had been put to beneficial use were waters that were made available through gravity flow. No beneficial use had been made of the dead storage water. It was not until 1977, when the United States installed pumps on the Lake Cle Elum Reservoir, that the availability of dead storage water for beneficial use became a reality.

Recognizing these facts, the district court, in its Memorandum and Order of July 13, 1978, determined the "withdrawal of dead storage waters from Lake Cle Elum was not within the contemplation of the parties when the 1945 decree was entered." (Record at 514) The consent decree was thus interpreted to exclude the dead storage water from its coverage. We find no error in the district court's reasonable interpretation

of the consent decree and we affirm.

B. Project Water

The district court also ruled that the dead storage water was "project water." We agree. "Project water" is water that would not be available for irrigation use "but for the fact that it has been developed by the United States. Israel v. Morton, 549 F.2d 128, 132 (9th Cir. 1977). Here, the installation of the pumps brought about the availability of the dead storage water for irrigation use. In that sense, the dead storage water was developed by the United States and was thus project water.[1/]

C. Withdrawal of Dead Storage Water

The district court was aware that the withdrawal of the dead storage water could adversely affect the rights of the users under the 1945 consent decree. The district court, in administering the consent decree, therefore, set out procedures for the withdrawal of the dead storage water. The procedures were designed to protect parties to the consent decree from interference with the "rights to the use or the delivery of those quantities of water which are recognized"

under the consent decree.[2/] (Record at 172)

The only issue raised regarding these procedures relates to the authority granted to the watermaster in monitoring the withdrawals. Appellees Union Gap Irrigation District and Yakima Valley Canal Company voice concern that the authority granted to the watermaster is too broad. While we do not believe that the watermaster's authority is too broad, we emphasize that the discretion the watermaster has in monitoring and allowing the withdrawal of the dead storage water is limited by the priority rights under the consent decree and is subject to the supervision of the district court.

The district court's order is thus AFFIRMED.

1/ While the dead storage water is project water, and its allocation will be determined by the United States and relevant federal laws, Israel v. Morton, 549 F.2d at 132-133, the district court correctly ruled that the withdrawal of the dead storage water is subject to appropriate state laws and regulations. See California v. U.S., 438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978).

2/ The procedures established by the district court provided that:

> "Therefore, 'dead storage' water in Lake Cle Elum reservoir may only be withdrawn for use of movant and its participating districts after full provision is made for the monthly allocation under the 1945 decree. It shall be the duty of the watermaster heretofore appointed by the Court to monitor withdrawal and to order cessation of pumping of 'dead storage' water whenever, in his judgment, withdrawal is depriving 1945 decree users of their priority allocations. The Court is aware that this method of attempting to make a reasonable and equitable solution to problems created by drought years may result in some interference with 1945 decree users' rights due to miscalculations by the watermaster, sudden changes in natural flow or time lapse. In such instance, the withdrawal of these 'dead storage' waters must be discontinued until

> natural flow has fully restored the 1945 decree water and all such deficiency shall be charged against the withdrawing parties' (of 'dead storage' water) subsequent year's allocation."

(Record at 515-516).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT,
UNITED STATES OF AMERICA, et al.,

Appellees,

v.

SUNNYSIDE VALLEY IRRIGATION
DISTRICT, et al.,

Appellants.

NO. 78-3065

Before DUNIWAY and ANDERSON, Circuit Judges, and BONSAL, District Judge*

The petition for rehearing of appellant Sunnyside Valley Irrigation District is DENIED.

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*The Honorable Dudley B. Bonsal, Senior United States District Judge, Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT,
UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

SUNNYSIDE VALLEY IRRIGATION
DISTRICT, et al.,

Defendants.

CIVIL NO. 21

MEMORANDUM AND ORDER

The Roza Irrigation District moves this Court for a declaration that water recently made available from the Lake Cle Elum Reservoir of the Yakima Reclamation Project is not part of the water supply adjudicated in the 1945 Consent Decree and is thus not subject to the allocations of water established by the 1945 decree. The water to which movant refers is the water in Lake Cle Elum lying below the artificially stored water in the Lake Cle Elum Reservoir and consisting of the natural lake existing prior to the raising of the lake level by reclamation projects. This water is sometimes referred to as "dead storage" water.

The 1945 Consent Decree established a schedule of priorities for the use of Lake Cle Elum Reservoir waters during periods of low water. Paragraph 18 of the 1945 decree defines "total water supply available" as:

> " . . . that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contractual obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States."

At the time of the entry of the 1945 decree the only available water from Lake Cle Elum was that supplied by gravity. It was not until the Bureau of Reclamation in concert with movant Irrigation District (and other districts) artificially created a means to gain beneficial use of this "dead storage" water through pumping that the water which is the subject of this motion became available. Thus, withdrawal of "dead storage" waters from Lake Cle Elum was not within the contemplation of the parties

when the 1945 decree was entered.

The newly available "dead storage" waters are project waters. As stated in Israel v. Morton, 549 F.2d 133 (9th Cir. 1977) at 132-133:

> "Project water . . . would not exist but for the fact that it has been developed by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix."

The water thus made available as "project water" should be allocated among the agencies financing the pumping project. However, it is apparent that withdrawal of this water will affect the water allocated by the 1945 decree and the priority rights of the parties under that decree must be protected.

In this connection, reference is made to provisions of the Reclamation Act, 43 U.S.C. 371 et seq, under which this pumping project is constructed. By section 8 of that Act (43 U.S.C. 383) Congress expressly provided that state water laws must be recognized. See California v. United States, 46 U.S.L.W. 4997 (July 3, 1978). Therefore, nothing in this order shall be construed to

authorize or permit withdrawal of the "dead storage" waters unless and until the State of Washington, acting through its Department of Ecology, has approved the Department of Interior's pending application for authority to withdraw and distribute such waters.

It is obvious that any withdrawal of "dead storage" water will affect water allocated under the 1945 decree as there is no means by which the two bodies can be separated. The rights of the users under the 1945 decree are fixed on a monthly basis. Thus, if the withdrawal of the subject water reduces the volume in Lake Cle Elum below that necessary to fulfill 1945 decree rights there is an immediate adverse effect on the rights of the priority users.

Therefore, "dead storage" water in Lake Cle Elum reservoir may only be withdrawn for use of movant and its participating districts after full provision is made for the monthly allocation under the 1945 decree. It shall be the duty of the watermaster heretofore appointed by the Court to monitor withdrawal and to order cessation of pumping of "dead storage" water whenever, in his judgment, withdrawal

is depriving 1945 decree users of their priority allocations. The Court is aware that this method of attempting to make a reasonable and equitable solution to problems created by drought years may result in some interference with 1945 decree users' rights due to miscalculations by the watermaster, sudden changes in natural flow or time lapse. In such instance, the withdrawal of these "dead storage" waters must be discontinued until natural flow has fully restored the 1945 decree water and all such deficiency shall be charged against the withdrawing parties' (of "dead storage" water) subsequent year's allocation.

IT IS SO ORDERED.

DONE BY THE COURT this 12th day of July, 1978.

/s/ Marshall A. Neill
United States District Judge

UNITED STATES CONSTITUTION
AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

WASHINGTON STATE CONSTITUTION

AMENDMENT 9

ARTICLE I, Section 16. EMINENT DOMAIN.

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, less a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion

that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DONALD E. BEVAN,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 48

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This appeal came on for a hearing on the 13th day of January, 1972 before all members of the Board on the sole issue of whether construction of a nature to cause diversion or an impedance of the flow was necessary to an appropriation of water under the laws of the state. The appellant Dr. Donald E. Bevan, was personally present, and he was represented by his attorney Charles E. Corker; the Department of Ecology was represented by Glen H. Fiedler, a supervisor, and by its attorney, Robert V. Jensen, assistant attorney general.

The appellant, Dr. Donald E. Bevan, testified as did Mr. Glen H. Fiedler, Mr.

Murray G. Walker and Mr. Ralph Anderson for the respondent, Department of Ecology. All exhibits offered were admitted.

Counsel for both parties had previously submitted written briefs, and also presented oral arguments.

Based on the evidence and the arguments submitted, the Pollution Control Hearings Board made Proposed Findings of Fact, Conclusion and an Order together with an Addendum. These were submitted to Dr. Bevan, the Department of Ecology and their respective counsel on February 1, 1972. The Respondent's Exceptions were received on March 3, 1972 and the Appellant's Reply thereto on April 10, 1972.

Since that date, the Pollution Control Hearings Board has again studied the record in the light of the exceptions taken and the reply thereto, and adheres in substance to the proposed decision; however, certain changes and additions have been made in the Findings of Fact and Conclusions, and the Board now presents the following as its Findings of Fact, Conclusions and Order.

FINDINGS OF FACT

I.

Dr. Donald E. Bevan, a member of the

faculty of the College of Fisheries at the University of Washington on April 17, 1969 filed an application for 5.0 cubic feet per second (June 1 through October 31) from the surface water of Cherry Creek, a tributary of the Snoqualmie River in King County, within the E 1/4 of the NW 1/4, Section 17, Township 26 North, Range 7 E.W.M. (Surface Water Application #21550).

II.

Dr. Bevan desired this appropriation for fish propagation research which could lead to improved migration, rearing and spawning of salmon and trout. Dr. Bevan is recognized as an expert in that field, and the potential value of his research was not questioned. The flow of Cherry Creek through Dr. Bevan's property, where he intends to conduct his research would not be diminished in quantity or quality by his research and experimentation.

III.

Dr. Bevan owns the land on both sides of Cherry Creek in the area in which his proposed research will be conducted. To facilitate the research, he has riprapped the channel on both banks, where Cherry Creek flows through his property. The expense for one side was $2,232.13, of

which $1,663.50 was reimbursed by the Department of Agriculture (Agricultural Stabilization and Conservation Service). The riprapping on the other side was done at an earlier date, and Dr. Bevan's records of cost are not available, but he believes it to have been more expensive. These expenditures were all made prior to the present application.

IV.

The Department of Ecology concedes that the appellant's research in fish propagation is a beneficial use, but assuming that the desired amount of water is available, it insists that some construction either by way of a diversion or an impedance of the flow is essential to an appropriation of water under RCW Chapter 90.03.

V.

Practically all appropriations from streams do deal with a diversion from the stream, or an impeding of the flow in the channel of the stream, neither of which is necessary in the present instance, and would in fact be inadvisable. There would be no injury to the public or its rights in the water resulting from the research conducted by Dr. Bevan and no consumptive use of the

water.

From the foregoing Findings of Fact, the Pollution Control Hearings Board reaches the following

CONCLUSIONS

I.

No issue of fact is presented; the sole issue is whether there must be some construction in the nature of a diversion of or an impedance in the waters of a stream, before there can be an appropriation of a certain amount of the waters of that stream.

II.

Neither the statutes nor the public policy of this state require an appropriator to either divert appropriated water from a stream, or to in some way impede its flow, when neither is necessary to accomplish the beneficial purpose for which the water is required.

III.

Historic usage requiring a diversion or some impedance of the flow as a prerequisite to an appropriation for a beneficial use cannot be relied upon when the circumstances that made the usage relevant are not presently applicable. "New occasions teach new duties; Time makes

ancient good uncouth."--(Lowell)

IV.

Based upon the Findings of Fact and particularly Finding V, we must conclude that no diversion or impedance of the waters of Cherry Creek shall be required as a condition of the appropriation requested by Dr. Bevan.

ORDER

Based on the foregoing Findings of Fact and Conclusions, the Pollution Control Hearings Board enters this order, reversing the decision of the Department of Ecology denying Surface Water Application #21550 of Donald E. Bevan because the application did not require some construction in the nature of a diversion or an impedance in the waters of the stream; that being in the judgment of the Board an insufficient and improper basis for denying the application; the Pollution Control Hearings Board further directs the Department of Ecology to further consider the application and act thereon.

DONE at Olympia, Washington, this 6th day of June, 1972.

POLLUTION CONTROL HEARINGS BOARD

/s/ Matthew W. Hill
MATTHEW W. HILL, Chairman.

/s/ James T. Sheehy
JAMES T. SHEEHY, Member

/s/ Walt Woodward
WALT WOODWARD, Member

ADDENDUM

This case may be sui generis by reason of the unusual nature of the use for which the water is required. We decide only the issue squarely presented to us; i.e., an appropriation of water for a beneficial use cannot be denied because no diversion or impedance is required.

Nor do we regard this application as in any sense the establishment of a minimum flow by private action from June 1 to October 31 of each year. The State is entitled to take such action as it may desire in establishing a minimum flow. Dr. Bevan's use being non-consumptive; the only limitation that we see on the Department of Ecology is to restrict any diversion from upstream sources that would reduce the amount available to Dr. Bevan during the designated period below 5.0 cubic feet per second.

80-637

Supreme Court, U. S.
FILED
NOV 13 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980
No. ____

Sunnyside Valley Irrigation District,

Petitioner,

v.

Kittitas Reclamation District; United States of America; Roza Irrigation District; Union Gap Irrigation District; and Yakima Valley Canal Company;

Respondents.

RESPONDENT ROZA IRRIGATION DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS G. NELSON
Counsel for Respondent
Roza Irrigation District

Office and Post Office Address:
Idaho First National Bank Building
P. O. Box 1906
Twin Falls, Idaho 83301
(208) 734-0700

IN THE

SUPREME COURT

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THOMAS G. NELSON
Counsel for Respondent
Roza Irrigation District

Office and Post Office Address:
Idaho First National Bank Building
P. O. Box 1906
Twin Falls, Idaho 83301
(208) 734-0700

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	
I. THE UNITED STATES HAS NEVER APPROPRIATED THE 100,000 ACRE FEET OF LAKE CLE ELUM DEAD STORAGE	3
II. THE DEAD STORAGE WATER IN LAKE CLE ELUM WAS NOT INCLUDED IN THE WATER SUBJECT TO THE OPERATION OF THE 1945 DECREE	9
III. THERE IS NO CONFLICT BETWEEN THE DECISION IN THE COURTS BELOW AND ANY OTHER CIRCUIT COURT DECISION	11
IV. SVID'S POSITION, IF ADOPTED, WOULD BLOCK ALL FURTHER DEVELOPMENT IN THE YAKIMA PROJECT	14
CONCLUSION	15

TABLE OF CASES

	Page
California vs. United States, 438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978)	4
Fox vs. Ickes, 137 F.2d 30, D.C. Cir. 1943)	11, 13 14
Handy Ditch Co. vs. Greeley and Loveland Irrigation Co., 280 Pac. 481 (1929)	8
Ickes vs. Fox, 85 F.2d 294, (D.C. Cir. 1936)	6, 11 13, 14
Schodde vs. Twin Falls Land and Water Company, 24 U.S. 107 . . .	7
State Ex. Rel. Reynolds vs. Miranda, 493 P.2d 409 (N.M. 1972) .	7
Walsh vs. Wallace, 67 Pac. 914 (Nev. 1902)	7
Warner Valley Stock Company vs. Lynch, 336 P.2d 884 (Ore. 1959) . .	8

MISCELLANEOUS

	Page
"C. R. Lentz Review Yakima Project Water Rights and Related Data", published in 1974, at page 74	1, 3
43 U.S.C. §§ 372 and 383	3
43 U.S.C. §§ 419 and 461	14
43 U.S.C. § 523	15

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980
No. ____

Sunnyside Valley Irrigation District,

Petitioner,

v.

Kittitas Reclamation District; United States of America; Roza Irrigation District; Union Gap Irrigation District; and Yakima Valley Canal Company;

Respondents.

RESPONDENT ROZA IRRIGATION DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS G. NELSON
Counsel for Respondent
Roza Irrigation District

Office and Post Office Address:
Idaho First National Bank Building
P. O. Box 1906
Twin Falls, Idaho 83301
(208) 734-0700

STATEMENT OF THE CASE

Petitioner Sunnyside Valley Irrigation District (hereafter "SVID") states that Permit No. 97 was issued for the construction of the Cle Elum Reservoir and that Permit No. 97 totalled 535,000 acre feet which included the 100,000 acre feet of dead storage which is the subject of the suit. (Petition, page 7) The contention concerning Permit No. 97 was advanced specifically for the first time in the SVID's petition for rehearing in the court below. However, reference to Permit No. 97 alone is misleading. Respondent Roza Irrigation District asks this Court to take judicial notice of a Bureau of Reclamation publication "C.R. Lentz Review Yakima Project Water Rights and Related Data", published in 1974. At page 74, that report states:

> "e. Cle Elum Reservoir. Application No. 3210 and Permit No. 97 for 535,000 ac. ft., initial application filed October 16, 1930. Although original Permit No. 97 gives the amount of water to be stored as 535,000 ac.ft., the active capacity is 436,900 ac.ft. (This notation is indicated on Proof of Appropriation,

dated December 29, 1951.) Certificate No. 8646 issued December 13, 1962, for 437,000 ac.ft."

ARGUMENT

I.

THE UNITED STATES HAS NEVER APPROPRIATED THE 100,000 ACRE FEET OF LAKE CLE ELUM DEAD STORAGE.

In 1931, the United States was issued Permit No. 97 for 535,000 acre feet of storage in Lake Cle Elum, which would include the 100,000 acre feet of pre-existing dead storage. However, the project as finally constructed by the United States did not enable it to use the 100,000 acre feet of dead storage and the certificate of water right ultimately issued by the State of Washington was for 437,000 acre feet, the active storage capacity (Lentz, supra). Therefore, the only water right ever acquired by the United States in Lake Cle Elum was the 437,000 acre feet of active storage.

The Reclamation Act directs the Secretary of the Interior to proceed in conformance with State laws in acquiring water rights for the various projects which he constructed. Section 8 of the Reclamation Act of 1902, (43 U.S.C. §§ 372 and 383, provides, in pertinent part:

> "Nothing in this act shall be construed as affecting or intended to

affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, . . . Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

The most recent expression of this Court on acquisition of reclamation project water rights confirms that the United States must comply with state law. In the case of California vs. United States, 438 U.S. 645, 57 L.Ed.2d 1018, 98 S.Ct. 2985 (1978), this Court held that a state can impose conditions on the appropriation of water for a reclamation project, not inconsistent with congressional directives. In doing so, the Court made it clear that state law controls the appropriation of water for federal reclamation projects:

"The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as

well as the form, of state water law." (98 S.Ct. at 3001)

Therefore, it is clear that the United States did not have any right to the use of the 100,000 acre feet of Lake Cle Elum dead storage in 1945, since the final certificate of water right did not include it. In addition, the water had not then, and has not now, been applied to a beneficial use.

If there were any doubts remaining concerning the existence of a "project water right" in the 100,000 acre feet of dead storage under Permit No. 97, the Bureau of Reclamation laid them to rest when it applied for a permit in 1977 to use the 100,000 acre feet by pumping. (Petition, page 13) If the United States already had a water right for the 100,000 acre feet, it would have been a totally useless act for it to apply again for the same right.

It is clear that not only did the United States have neither the ability to deliver the 100,000 acre feet of dead storage in 1945, nor the obligation to deliver the dead storage, it had no right under Washington law to the use of the

100,000 acre feet of water. Therefore, the United States was lacking in all aspects of what it needed to deliver the water: ability, obligation and right.

The fact that the certificate of water right ultimately issued by the State of Washington excluded the 100,000 acre feet appears conclusive on the question of whether or not the 100,000 acre feet of dead storage was ever applied to a beneficial use by the United States so as to perfect a water right. However, independent of the action of the State of Washington, dead storage is not a beneficial use of water so as to prevent use of the dead storage for beneficial use by others. In the case of Ickes vs. Fox, 85 F.2d 294, (D.C. Cir. 1936), cited and relied on by Petitioner, the Court said:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use." (85 F.2d at 298)

If diversion and storage is not enough, non-diversion and non-storage of a natural lake would also be insufficient for an agricultural water right.

The courts of the western states have decided analagous questions relating to what might be called "passive" uses of water. For example, in the case of State Ex. Rel. Reynolds vs. Miranda, 493 P.2d 409 (N.M. 1972) the question was whether grazing of livestock or harvesting of grass on areas overflowed during the flood season constituted such a diversion or application to a beneficial use as to give the landowner a water right. The specific issue was whether a man-made diversion was required. The court held that "man-made diversion, together with intent to apply water to beneficial use and natural application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes." (493 P.2d 409 at 411) To the same effect is the case of Walsh vs. Wallace, 67 Pac. 914 (Nev. 1902).

In the case of Schodde vs. Twin Falls Land and Water Company, 24 U.S. 107, this Court affirmed a lower court decision which held that an appropriator could not claim to have beneficially used the flow of the river where the river was used to turn water wheels to elevate the appropriator's

water to his land. In the case of Warner Valley Stock Company vs. Lynch, 336 P.2d 884 (Ore. 1959) the question stated by the court was:

> "Do these objectors have the right to insist that Hart Lake be fed with waters none of which, below the point of overflow, will be used for application upon the land in Warner Valley, but will serve only to raise the surface of the lake to a point of overflow?"

The court there held that the overflow method of appropriation was not protectible, and that the irrigators had no right to force continued delivery of water to Hart Lake so that it would overflow onto their lands.

In the case of Handy Ditch Co. vs. Greeley and Loveland Irrigation Co., 280 Pac. 481 (1929), the Supreme Court of Colorado rejected a claim by an appropriator of a natural flow right that he could "temporarily impound" his natural flow right. The court said:

> "(A)ll water impounded in any storage reservoir is to be put there only temporarily; otherwise, its capture from the stream must of necessity defeat the purpose of the law of beneficial user. . . The right to the use of water, whether by direct flow, or through storage reservoirs, is a

usufructuary right, and it would be absurd to suppose that water could be used for irrigation by permanently storing it in a reservoir." (280 Pac. at 481, 482)

Under the general law found in the arid western states, the dead storage water of Lake Cle Elum has never been applied to a beneficial use and cannot be said to have been previously appropriated to the benefit of the Yakima Project or SVID.

II.

THE DEAD STORAGE WATER IN LAKE CLE ELUM WAS NOT INCLUDED IN THE WATER SUBJECT TO THE OPERATION OF THE 1945 DECREE.

The judgment entered in the District Court in 1945 by its terms excluded any delivery of the 100,000 acre feet dead storage in Lake Cle Elum. As quoted at pages 9 to 11 of the Petition, the judgment provides, in pertinent part, relative to the obligations of the United States:

"2. The obligations of the United States to deliver from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, . . . are as set forth hereafter in this judgment.

> "20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment . . . Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to, or interfering with any of the rights to the use or the delivery of those quantities of water which are recognized in this judgment."

The short answer then, to the contentions of SVID, is that only the United States' obligation to <u>deliver</u> water was set forth in the 1945 decree. There was no obligation in the Decree to <u>acquire</u> new water rights for delivery. Also, the parties were restrained and enjoined from interfering with or asserting claims to rights recognized in the decree. The United States could have no obligation to deliver water from the dead storage in Lake Cle Elum, since it was not physically available to the United States in 1945, or since, and one cannot assume that the lower court was ordering the United States to do something which it

could not do. Thence, the right to delivery of water from the dead storage in Lake Cle Elum could not have been recognized in the decree, and the injunction language could not apply to the Lake Cle Elum dead storage water, since that right was not recognized by the decree.

III.

THERE IS NO CONFLICT BETWEEN THE DECISION IN THE COURTS BELOW AND ANY OTHER CIRCUIT COURT DECISION.

SVID contends that there is a conflict between the decisions below and the Ickes vs. Fox, series of cases (85 F.2d 294, D.C. Cir. 1936; 300 U.S. 82, 1937; Fox vs. Ickes, 137 F.2d 30, D.C. Cir. 1943).

The Ickes vs. Fox decision can perhaps be categorized as somewhat of an aberration, but even accepting the cases as they stand, a much different question was involved in the Ickes vs. Fox cases, and those decisions were all in place prior to the 1945 judgment in the District Court upon which SVID bases its claims. In the Ickes vs. Fox, supra, situation, Fox and others had water rights through the Washington Irrigation

Company before the United States purchased certain water rights and systems from that company. Plaintiffs then executed contracts with the United States for certain water rights on payment of certain sums which they had paid. The amount of water to be delivered was not specifically stated, but was to be beneficially used. For a number of years the U.S. delivered well over 4 acre feet per acre, apparently agreeing that the water delivered was being applied to a beneficial use.

In the 1930's, due to a dry cycle, and the addition of more acres to the Yakima project, the United States desired to construct more storage. Lake Cle Elum was selected as a site, but the U.S. found that the project would not pay for itself unless $1 million could be raised. The Secretary of the Interior then proposed to restrict deliveries to the plaintiffs and others to a maximum amount of 3 acre feet per acre unless the plaintiffs agreed to rent additional water, thus covering the deficiency in the construction cost repayment.

The result of the Ickes vs. Fox, supra, cases was that plaintiffs did not have to pay for the additional water above 3 acre feet per acre. The basis of the decisions apparently is that the water rights had previously been fixed at a greater amount by the application of the larger amount of water to a beneficial use. The United States, as the diverter, storer and carrier of the water, had no water right itself, and could not unilaterally restrict the use of water by plaintiffs.

Those cases do not stand for the proposition advanced by SVID that it already had a right to the delivery of water from Lake Cle Elum. If the United States had not constructed Lake Cle Elum, obviously SVID could not have forced its construction. As pointed out in Fox vs. Ickes, 137 F.2d 30, at 33, the Secretary of the Interior "is not obligated to furnish any more water than is available." If the Secretary had constructed Lake Cle Elum Dam and Reservoir and contracted to sell all the stored waters to others, SVID could not complain, since it was then no worse off than it was

without the reservoir. As the Fox vs. Ickes case points out, in time of shortage, distribution of water would be by priority under the laws of the State of Washington. (137 F.2d. 30 at 33) The basic case herein had already been filed in the District Court for the purpose of fixing those priorities. (137 F.2d 30, note 11)

The Ickes vs. Fox cases did not define any rights of SVID as proratable storage or nonproratable natural flow and certainly did not give SVID any rights in unused and usable dead storage in Lake Cle Elum. Therefore, no conflict exists between the decisions below, and the Ickes vs. Fox cases.

IV.

SVID'S POSITION, IF ADOPTED, WOULD BLOCK ALL FURTHER DEVELOPMENT IN THE YAKIMA PROJECT.

The basic Reclamation Act, in Section 4, required the Secretary to recover the costs of the project from the entrymen:

> "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably, . . ." (43 U.S.C. §§ 419, 461)

The same general policy is found throughout the reclamation law, including the Warren Act, (43 U.S.C. 523).

SVID relies on the Ickes vs. Fox cases to avoid imposition of any construction costs for further water supply development. It then asserts that any such increased water supply must be made available to fill SVID's claimed rights, even though SVID will not pay for any of the costs.

Since the Secretary must recover the cost of constructing new irrigation water supply facilities from project water-users, he has to sign contracts with those users. If SVID is correct, then the Secretary cannot contract to deliver the 100,000 acre feet of dead storage water to Roza even if Roza were willing to pay for it. There is no reason for Roza to pay for the cost of the project, since the water developed thereby cannot be committed to Roza.

The effect of a ruling in SVID's favor would be to eliminate any possibility of constructing new storage facilities in the Yakima project to alleviate water shortages. Such a construction of

the 1945 judgment would be unreasonable, and contrary to logic and the whole course of the reclamation movement in the United States.

CONCLUSION

Respondent Roza Irrigation District respectfully requests that SVID's Petition for Writ of Certiorari be denied.

DATED this ____ day of November, 1980.

Respectfully submitted,

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

By: _____
Thomas G. Nelson
Attorney for Respondent
Roza Irrigation District

No. 80-637

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUNNYSIDE VALLEY IRRIGATION DISTRICT,
PETITIONER

v.

KITTITAS RECLAMATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether "dead storage" water below the outlet works of Cle Elum Reservoir should be allocated under the terms of a consent decree entered on January 31, 1945.

2. Whether distribution of dead storage water, outside the terms of the consent decree, takes property of the petitioner within the meaning of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Agins v. *City of Tiburon*, No. 79–602 (June 10, 1980)	10
Fox v. *Ickes*, 137 F.2d 30, cert. denied, 320 U.S. 792	3, 8
Ickes v. *Fox*, 300 U.S. 82, aff'g 85 F.2d 294	3
Kittitas Reclamation District v. *Sunnyside Valley Irrigation District*, Civ. No. 21, terminated by consent decree (E.D. Wash. Jan. 31, 1945)	3
United States v. *Armour & Co.*, 402 U.S. 673	7
United States v. *ITT Continental Baking Co.*, 420 U.S. 223	7

Constitution and statutes:

United States Constitution, Fifth Amendment	9, 10
Reclamation Act, ch. 1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*	2
Section 4, 43 U.S.C. 419	2
Reclamation Project Act of 1939, 43 U.S.C. 485 *et seq.*:	
43 U.S.C. 485h(d)	7

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Constitution and statutes—Continued: Page

43 U.S.C. 485h(e) 7
Warren Act, Section 1, 43 U.S.C. 523 2
1977 Wash. Laws, ch. 1 (First Extraordinary Sess.) 5
Wash. Rev. Code Ann. 1962:
§ 90.40.010 *et seq.* 2
§ 90.40.030 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 626 F.2d 95. The opinion of the district court (Pet. App. A-14 to A-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1980. A timely petition for rehearing was denied on September 10, 1980 (Pet. App. A-13). The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A consent decree executed by, among others, the parties in this case and entered on January 31, 1945, defines the obligations of the United States Bureau of Reclamation to deliver water to and among certain users in the Yakima Watershed, located in South Central Washington State. The central dispute in this case is whether water that could not be distributed at all when the decree was entered, but which is now available, must be distributed in accordance with the decree. After the construction of the Cle Elum Dam and before 1977, "dead storage" or "substorage" water lower than the outlet works of the dam could not be used for irrigation.[1] At a cost of about $2.7 million, the

[1] The water now termed "dead storage" in Cle Elum Reservoir was originally a naturally formed lake in the Cle Elum River, a tributary of the Yakima River (R.A. 513). "R.A." refers to the record on appeal; "1978 Tr." refers to the transcript of the hearing in district court on June 5, 1978.

United States Bureau of Reclamation installed pumps on a floating barge to lift the dead storage water to the outlet works in 1977 (R.A. 465). The dead storage water then became physically available for irrigation use.

Use of water for irrigation in the Yakima Watershed has a long and complex history. Prior to 1902, individual irrigators and ditch companies had appropriated the entire natural low-water flow of the river and its major tributaries (1978 Tr. 13). Although the companies had built extensive diversion works, there was little artificial storage capacity. Upon enactment in 1902 of the Reclamation Act, ch.1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*, and enabling legislation in Washington State, Wash. Rev. Code Ann. § 90.40.010 *et seq.* (1962), the Bureau of Reclamation undertook to provide storage capacity in the Yakima Watershed.

In 1905, the United States reserved all the unappropriated water in the Yakima River and its tributaries, including the Cle Elum Lake, for use in a future reclamation project pursuant to Wash. Rev. Code Ann. § 90.40.030 (1962). Upon completion of the construction of the Yakima Reclamation Project, permits for appropriation of the water actually used by the project were issued to the United States and the reservation of the remaining water was extinguished. No permit was issued for the dead storage water in Cle Elum Reservoir and the water remains unappropriated water of the State of Washington (1978 Tr. 27-28).

In developing the Yakima Reclamation Project, the Bureau purchased the water appropriations and the irrigation system of the Washington Irrigation Company and assumed that company's rights and obligations to its users (R.A. 136). The Bureau also contracted to deliver water under both Section 4 of the Reclamation Act, 43 U.S.C. 419, and Section 1 of the Warren Act of 1911, 43 U.S.C. 523. In addition, the Bureau con-

tracted to provide supplemental storage rights to users who had "natural flow rights" (R.A. 137). Thus there were a variety of rights to the water controlled by the Bureau of Reclamation in the Yakima Watershed, including: (1) natural flow rights, (2) supplemental storage rights, (3) project storage rights (also known as public notice rights), and (4) Warren Act rights. An individual irrigation district often held rights in more than one of these categories.

In the 1930's, water users in the Yakima Watershed initiated litigation to determine the appropriate scope of the Bureau's power to allocate and charge for water distributed under the Yakima Project. See *Ickes* v. *Fox*, 300 U.S. 82 (1937), aff'g 85 F.2d 294 (D.C. Cir. 1936); *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943); *Kittitas Reclamation District*, v. *Sunnyside Valley Irrigation District*, Civ. No. 21, terminated by consent decree (E.D. Wash. Jan. 31, 1945). After the decision on the merits in *Fox* v. *Ickes*, *supra*, indicating that the rights of the users to waters distributed under the project were to be determined by reference to the laws of the State of Washington and not contracts with the Bureau, the parties in *Kittitas*, *supra*, executed the consent decree that is the subject of this litigation.

The decree does not, however, establish any property rights in the water; it merely defines the obligation of the Bureau to deliver water out of the available supply (R.A. 140). Its express purpose is to apportion "the available supply" of irrigation water (*ibid.*). The decree establishes "[t]he obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources * * *" (R.A. 145). Rather than attempt to quantify and assign priorities to the pre-existing

categories of rights to irrigation water, the parties to the decree created two new categories: non-proratable rights and proratable rights (R.A. 169–172). Each irrigation district or user was assigned an amount of water to be delivered during the irrigation season. For those irrigation districts or users that had water rights considered superior, a portion of the water was designated as exempt from proration in the event of shortage (R.A. 170–172). In establishing the proration formula, the decree defines the "total water supply available" as the natural flow of the river and its tributaries, the storage of the various reservoirs, and other sources (R.A. 170). Perhaps because all planned storage units of the Yakima project were complete in 1945, the decree does not expressly address expansion of the water supply through alteration or additional construction of storage facilities.

In 1977, there was a severe drought in the Yakima area. The natural flow of the Yakima River was so reduced that early estimates projected that it would satisfy less than 50% of the non-proratable water rights. The balance of the non-proratable rights were to be satisfied from storage water in reservoirs and return flows from other users (R.A. 177). Consequently, those irrigation districts with only proratable water rights, including Roza Irrigation District and Kittitas Reclamation District, would have suffered an extreme reduction in the amount of water delivered. For example, early estimates indicated that one of these districts would receive only six percent of its normal supply of water (R.A. 178).

In response, on March 18, 1977, the Roza Irrigation District filed a motion with the district court to reopen and interpret the consent decree in a manner which would grant Roza additional water (R.A. 174). Kittitas Reclamation District developed a plan to obtain additional water by pumping the dead storage water lo-

cated below the outlet works at Cle Elum Reservoir (R.A. 183–188). On April 8 and 13, 1977, the United States filed motions with the district court for appointment of a water master to supervise the distribution of water in the area and for permission to pump the dead storage water from Cle Elum for the benefit of Roza Irrigation District and Kittitas Reclamation District (R.A. 208, 265).

On April 26, 1977, the district court denied the motion to reopen and interpret the consent decree (R.A. 446–447). The court also denied the United States' motion for permission to pump the dead storage water from Cle Elum Reservoir, stating that the dead storage water was outside "the provisions of the Judgment of January 31, 1945" (R.A. 448).

The United States obtained an emergency permit from the State of Washington to appropriate the dead storage water. See 1977 Wash. Laws, ch. 1 (First Extraordinary Sess.). The government spent $2,700,000 install pumps on a floating barge to lift the dead storage water to the outlet works at Cle Elum Dam (R.A. 465). The actual 1977 water supply was greater than the early estimates, and the dead storage pumping system was not used.

The emergency permit to appropriate the dead storage water expired at the close of the 1977 irrigation season. The United States has filed an application for a permit to appropriate the dead storage water permanently (for the benefit of Roza and Kittitas) (1978 Tr. 28–29). This permit application is still pending before the State.

On March 13, 1978, Roza Irrigation District filed a motion for interpretation of the consent decree to exclude the dead storage of Cle Elum lake from the waters governed by the decree (R.A. 461). The district court granted this motion. It ruled that withdrawal of

dead storage water from Lake Cle Elum "was not within the contemplation of the parties when the 1945 decree was entered" (Pet. App. A-15 to A-16). It was new project water which had recently been made available by the efforts and expenditures of the government, and not water subject to allocation under the consent decree (Pet. App. A-16). In deference to state water authorities, however, the court further stated that its order should not be deemed to authorize the withdrawal of dead storage waters unless and until the State of Washington approves the pending application to appropriate the water (Pet. App. A-16 to A-17). Because of the obvious relationship between the dead storage waters and the waters subject to the 1945 consent decree, the district court conditioned withdrawal of the dead storage waters upon satisfaction of the monthly allocations under the 1945 decree (Pet. App. A-17 to A-18).

The court of appeals affirmed. The court found that the consent decree could be fairly read to include or exclude the dead storage waters (Pet. App. A-7). Noting that a consent decree, like a contract, should be construed on the basis of the language of the decree and in light of the surrounding circumstances (Pet. App. A-7), the court of appeals held that the district court's conclusion that the decree did not include dead storage water was a reasonable interpretation of the consent decree (Pet. App. A-8 to A-9). The court of appeals also affirmed the district court's characterization of the dead storage water as "project water" and the limitation on withdrawal of the water to prevent interference with the rights recognized in the 1945 consent decree (Pet. App. A-9 to A-10).

ARGUMENT

This case presents no issue warranting review by this Court. The judgment of the court of appeals is

correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners contend that the decisions of the district court and court of appeals are in error because they failed to give adequate consideration to the purpose of the consent decree or to the circumstances surrounding its formation (Pet. 17–18). The court of appeals, however, explicitly noted the rulings of this Court that consent decrees are to be interpreted like contracts with reference to the circumstances underlying the decree as aids to construction (*United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975)) (Pet. App. A–7). The present decision is merely an application of these principles to a concrete factual situation.

As the court of appeals stated, the consent decree may fairly be read to exclude or include the dead storage water (Pet. App. A–7). The decree does not expressly address expansion of the water supply available for use through alteration or additional construction of storage facilities. If the consent decree were read to include water made available through new or supplemental construction, it would be a substantial barrier to investment in new project work in the Yakima Watershed. Under the Reclamation Project Act of 1939, no water may be delivered from a new or supplemental project unless a contract is executed which provides the user with a first, preferred right to a stated share of the project's available water supply. 43 U.S.C. 485h(d) and (e). Such a contract cannot be executed with the irrigation districts most in need of additional water—those with only proratable water rights—if subsequently created supplies of water are

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[2] In fact, the water made available by installation of the floating pumps in Cle Elum Reservoir has not yet been distrib-

to be distributed subject to the consent decree.[2] The court of appeals' decision affirming the district court's interpretation of the consent decree thus leads to a reasonable result consistent with the language of the decree.

Interpretation of the 1945 consent decree does not present a question of sufficient importance to warrant review by this Court. The consent decree is unique and followed a long and complicated history of water appropriation in the Yakima Watershed. The precise issue considered by the lower courts, moreover, dealt with the unusual situation of dead storage water which was originally a naturally formed lake subject to independent appropriation under state law. The opinion of the court of appeals, therefore, does not have significant import for generally applicable water law under the Reclamation Act.

2. Petitioner's contention (Pet. 24) that the decision in this case conflicts with that in *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir. 1943), rests on the erroneous premise that petitioner had a vested water right in the beneficial use of Cle Elum dead storage water. In *Fox* v. *Ickes*, *supra*, the court of appeals ruled that the Reclamation Act did not authorize the Secretary of the Interior to impose additional construction charges for the delivery of water in which irrigation users had already acquired a vested property right because of their prior beneficial use of the water. *Id.* at 33–35. In the present case, the dead storage waters are unap-

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uted, in part, because no contract for reimbursement of installation costs has been executed. The irrigation districts with solely proratable water rights under the 1945 decree indicated at the hearing in district court that they could not execute such a contract if the consent decree were interpreted to cover the dead storage water in Cle Elum Reservoir (1978 Tr. 32).

propriated waters of the State of Washington,[3] and petitioner has no property right in their use.

Petitioner's suggestion (Pet. 21–22) that the dead storage waters were appropriated as support or foundation for water that was beneficially used is misleading. Although the State of Washington may recognize some forms of non-consumptive use as beneficial use sufficient to support an appropriation, the State has indicated that the dead storage waters in this case have not been appropriated by beneficial use (1978 Tr. 28–29).

3. Petitioner's claim (Pet. 27–28) that the interpretation of the consent decree to exclude dead storage water is an uncompensated taking of their property proscribed by the Fifth Amendment fails on its premise. Petitioner has no property interest in the dead storage water. Withdrawal of dead storage water in accordance with the decisions of the courts below (Pet. App. A–18, A–9 to A–10) will have virtually no effect on petitioner's property interests in the water covered by the decree (*i.e.*, live storage, Pet. App. A–17).

Petitioner also asserts (Pet. 27–28) that under certain conditions in the future the limitations on withdrawal of dead storage water imposed by the district court may not be adequate to protect their right to receive water from live storage in the Cle Elum Reser-

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[3] Petitioner's contention that the dead storage waters were appropriated pursuant to permit number 97 (Pet. 7) is erroneous. As stated above, all water in the Yakima Watershed was withdrawn to permit development of the Yakima project in the early 1900's. When the Yakima project was finished, permits for appropriation of the water actually used by the project were issued to the United States. No permit was issued for the dead storage water in Cle Elum Reservoir. Counsel for the State of Washington made it clear in the district court that the dead storage waters were public waters of the State and not heretofore appropriated (1978 Tr. 28–29).

voir. Those circumstances, however, have not yet occurred and may never be presented. In fact, for lack of both a repayment contract and a state permit to appropriate the dead storage water, and, recently, apparent partial destruction of the floating pumps, no water has been withdrawn from dead storage. In any event, such speculative potential interference with petitioner's interests is not a "taking" for purposes of the Fifth Amendment. See, *e.g.*, *Agins* v. *City of Tiburon*, No. 79-602 (June 10, 1980), slip op. 6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
SANFORD SAGALKIN
Acting Assistant Attorney General
EDWARD J. SHAWAKER
ANNE S. ALMY
Attorneys

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